

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

February 6, 2004

IN RE:

COMPLAINT OF BEN LOMAND
COMMUNICATIONS, INC. AGAINST
CITIZENS COMMUNICATIONS
COMPANY OF TENNESSEE, LLC D/B/A
FRONTIER COMMUNICATIONS OF
TENNESSEE

DOCKET NO.
02-01221

ORDER PARTIALLY GRANTING BEN LOMAND'S MOTION TO COMPEL

This docket is before the Hearing Officer for consideration of *Ben Lomand Communication Inc 's Third Motion to Compel Responses to Its Discovery Requests* ("Third Motion to Compel") filed on December 12, 2003. Ben Lomand Communications Inc ("Ben Lomand") filed the *Third Motion to Compel* at the request of the Hearing Officer¹ in order to identify the remaining discovery disputes in this docket. Citizens Telecommunications Company of Tennessee, LLC d/b/a Frontier Communications of Tennessee ("Frontier") filed its *Response to Ben Lomand Communication Inc 's Third Motion to Compel Responses to Its Discovery Requests* ("Response to Third Motion to Compel") on December 17, 2003. For the reasons stated herein, the *Third Motion to Compel* is granted in part and denied in part.

¹ At a status conference noticed on November 25, 2003 and held on December 9, 2003 the Hearing Officer directed counsel for Ben Lomand to file a pleading identifying the remaining issues related to discovery in this docket. *Transcript of Hearing*, p. 10 (December 9, 2003).

I. BACKGROUND AND PROCEDURAL HISTORY

Frontier² is an incumbent local exchange carrier serving Weakley, Putnam, and Cumberland Counties as well as the cities of Sparta (located in White County) and McMinnville (located in Warren County). Frontier filed revisions to its General Customer Services Tariff (“*Tariff*”) on April 11, 2002 introducing two new service offerings to business customers. The first offering is a Centrex-based service marketed under the name “Versaline.” The second offering provides flat-rate business customers with discounts for committing to term plans in combination with other selected Frontier offerings. Both offerings are limited to customers in the McMinnville and Sparta exchanges. The *Tariff* became effective on May 12, 2002.

Ben Lomand is a competitive local exchange carrier and is a wholly-owned subsidiary of Ben Lomand Rural Telephone Cooperative. Ben Lomand’s authorized service area includes the cities of McMinnville and Sparta.

Ben Lomand filed its *Complaint* against Frontier on November 12, 2002 alleging that the *Tariff* unlawfully discriminates against Frontier’s customers not located within the McMinnville and Sparta exchanges in violation of Tenn. Code Ann. § 65-4-122.³ The *Complaint* contained numerous allegations including that the *Tariff*’s offerings constitute unjust discrimination, undue and unreasonable preference, and unreasonable prejudice to customers who do not, or cannot, make such selections or subscriptions; that customers of both Frontier and Ben Lomand are unreasonably prejudiced by the *Tariff*’s provisions which limit these offerings to the McMinnville and Sparta exchanges in violation of the policy set forth in Tennessee’s Telecommunications Act. The *Complaint* also alleged that Frontier’s new service offerings result

² The terms “Frontier” and “Citizens” have been used interchangeably in previous orders and pleadings in this docket—both terms identify Citizens Telecommunications Company of Tennessee, LLC d/b/a Frontier Communications of Tennessee.

³ *Complaint*, p. 3 (November 12, 2002).

in cross-subsidization, predatory pricing, and other anti-competitive practices including offering services below cost, all in violation of Tenn Code Ann § 65-5-208(c)⁴ The *Complaint* also contained allegations that the *Tariff*'s offerings amount to special contracts offered in violation of Tennessee law and that the *Tariff* violates Tenn Code Ann § 65-5-204(a)(1)-(2) which prohibits discriminatory pricing and unjust or unreasonable ratemaking classifications.

In response to the *Complaint*, Frontier filed its *Citizens Telecommunications Company of Tennessee's Motion to Dismiss the Complaint* ("Motion to Dismiss") on December 4, 2002 denying the *Complaint*'s allegations on grounds that the Authority has previously approved a Frontier tariff which was limited to the McMinnville and Sparta exchanges, that the competitive conditions found in these two exchanges differ from those found in Weakly, Putnam, and Cumberland Counties, and that the prices in the *Tariff* comply with price floor requirements⁵. Frontier's *Motion to Dismiss* answered the *Complaint*'s characterization of the *Tariff* as offering illegal special contracts by pointing out that the offerings at issue in this docket are not special contracts because they are provided for in the general tariffs⁶. Ben Lomand filed its *Response of Ben Lomand Communications, Inc to Citizens Communications Company of Tennessee LLC, Frontier Communications of Tennessee's Motion to Dismiss* ("Response to Motion to Dismiss") on December 19, 2002. In its *Response to Motion to Dismiss* Ben Lomand took the position that

⁴ Tenn Code Ann § 65-5-208(c) states

Effective January 1, 1996, an incumbent local exchange telephone company shall adhere to a price floor for its competitive services subject to such determination as the Authority shall make pursuant to § 65-5-207. The price floor shall equal the incumbent local exchange telephone company's tariffed rates for essential elements utilized by competing telecommunications service providers plus the total long-run incremental cost of the competitive elements of the service. When shown to be in the public interest, the Authority shall exempt a service or group of services provided by an incumbent local exchange telephone company from the requirement of the price floor. The authority shall, as appropriate, also adopt other rules or issue orders to prohibit cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements or other anti-competitive practices.

⁵ *Motion to Dismiss*, pp 4-9 (December 4, 2002). Frontier filed a substitute pleading on December 10, 2002 attaching an exhibit that had inadvertently not been attached to the original December 4, 2002 pleading.

⁶ *Motion to Dismiss*, p 8 (December 4, 2002).

the existence of a previously-approved tariff limited to the McMinnville and Sparta exchanges and the existence of competition in those exchanges does not cure violations of the Tennessee statutes referenced in the *Complaint* and that although no price floor violations are alleged in the *Complaint*, other violations of Tenn Code Ann § 65-5-208(c) are alleged including cross-subsidization, price squeezing, predatory pricing, price discrimination, tying arrangements and other anti-competitive practices ⁷

Frontier filed its *Citizens Telecommunications Company of Tennessee, LLC's First Set of Discovery Requests to Ben Lomand Communications* ("Frontier's First Discovery Request") on January 31, 2003 Ben Lomand filed its *Request for Discovery From Ben Lomand Communications, Inc to Citizens Communications Company of Tennessee, LLC d/b/a Frontier Communications of Tennessee* ("Ben Lomand's First Discovery Request") on February 4, 2003 Ben Lomand filed its *Response of Ben Lomand Communications, Inc to Discovery Requests of Citizens Communications Company of Tennessee LLC, D/B/A Frontier Communications of Tennessee* on February 18, 2003. A protective order was filed in this docket on February 21, 2003 Also on February 21, 2003 and in reply to *Ben Lomand's First Discovery Request*, Frontier filed its *Citizens Telecommunications Company of Tennessee, LLC's Response to Request for Discovery* ("First Response to Ben Lomand's First Discovery Request") objecting to most of the requests contained in *Ben Lomand's First Discovery Request* The parties filed a joint motion on February 26, 2003 requesting that the Authority appoint a hearing officer to resolve procedural issues and discovery disputes On February 27, 2003 Ben Lomand filed *Ben Lomand Communications, Inc 's Motion to Compel Responses to Its Discovery Requests* ("First Motion to Compel")

⁷ *Response to Motion to Dismiss*, pp 4-6 (December 19, 2002)

At a regularly scheduled Authority Conference held on March 3, 2003 the panel assigned to this docket unanimously voted to appoint a hearing officer to this docket. Frontier filed its *Response to Ben Lomand Communications, Inc.'s Motion to Compel Responses to Its Discovery Requests* (“*First Response to Motion to Compel*”) on April 7, 2003. Ben Lomand filed a motion pursuant to TRA Rule 1220-1-2-.06(3) for leave to reply to the *First Response to Motion to Compel* on April 23, 2003. Ben Lomand filed a response to Request Number 2 of *Frontier's First Discovery Request* on April 24, 2003.

The Authority memorialized its decision to appoint a hearing officer and resolved the *Motion to Dismiss* in the *Order Convening Contested Case and Appointing a Pre-Hearing Officer* (“*Order*”) issued on April 29, 2003. In the *Order* the Authority found that it had addressed the issues raised by the *Complaint* regarding unjust price discrimination, undue or unreasonable preferences, unreasonable prejudice, and unjust or unreasonable rate making classifications in previous dockets.⁸ Based on its decisions in these previous dockets finding that tariffs offered in response to heightened competitive pressures need not be offered throughout a company's service territory the Authority partially granted the *Motion to Dismiss* by convening a contested case limited to consideration of allegations in the *Complaint* pertaining to anti-competitive behavior and predatory pricing in violation of Tenn. Code Ann. § 65-5-208(c).⁹ The *Order* also granted the February 26, 2003 joint motion and memorialized the unanimous March 3, 2003 vote to appoint the General Counsel or his designee to hear preliminary matters prior to a hearing on the merits, to rule on petitions to intervene, and to set a procedural schedule.¹⁰

⁸ *Order*, pp. 5-6, 7-8 (April 29, 2003).

⁹ *Order*, p. 8 (April 29, 2003).

¹⁰ *Order*, p. 9 (April 29, 2003).

On May 2, 2003 Frontier filed its *Proprietary and Confidential Supplemental Response of Citizens Telecommunications Company of Tennessee, LLC to Discovery Requests of Ben Lomand Communications, Inc* (“*Supplemental Response*”) together with Exhibit 1 to the *Supplemental Response* as a cumulative response to the outstanding discovery requests made by Ben Lomand¹¹ On June 16, 2003 Frontier filed additional responses to *Ben Lomand’s First Discovery Request* in its *Additional Proprietary and Confidential Supplemental Response of Citizens Telecommunications Company of Tennessee, LLC to Discovery Requests of Ben Lomand Communications, Inc* (“*Additional Supplemental Response*”)

A status conference was held on June 3, 2003 During the June 3, 2003 status conference counsel for Ben Lomand stated that Ben Lomand was still reviewing Frontier’s *Supplemental Response* and *Additional Supplemental Response*.¹² Also during the June 3, 2003 status conference the Hearing Officer requested that the parties jointly file a proposed procedural schedule Pursuant to this request Counsel for Ben Lomand filed a proposed procedural schedule on June 10, 2003 noting that the same had been approved by Counsel for Frontier The Hearing Officer adopted the proposed procedural schedule by way of an order issued on June 24, 2003 The order set September 22, 2003 as the hearing date for this matter

Ben Lomand filed its *Second Request for Discovery from Ben Lomand Communications, Inc to Citizens Communications Company of Tennessee, LLC d/b/a Frontier Communications of Tennessee* (“*Ben Lomand’s Second Discovery Request*”) on July 2, 2003 Frontier filed its *Citizens Telecommunications Company of Tennessee, LLC’s Response to Second Request for Discovery* (“*Response to Ben Lomand’s Second Discovery Request*”) on July 18, 2003 On July 21, 2003 the parties filed a joint motion requesting that the procedural scheduled adopted in the

¹¹ *Supplemental Response*, p 1 (May 2, 2003)

¹² Transcript of Proceedings, p 4 (June 3, 2003)

Hearing Officer's order of June 24, 2003 be adjusted with regard to the dates for filing discovery and pre-filed testimony. The joint motion acknowledged that the parties had exchanged some discovery but that some potential discovery disputes remained.¹³ The July 21, 2003 motion did not request an adjustment of the hearing date.¹⁴ The July 21, 2003 motion was granted by way of an order issued July 22, 2003

On August 4, 2003 the parties filed another joint motion requesting that the hearing date be changed. Also on August 4, 2003 Ben Lomand separately filed *Ben Lomand Communications, Inc 's Second Motion to Compel Responses to Its Discovery Requests* ("Second Motion to Compel") to replace the *First Motion to Compel* stating that several issues identified in the *First Motion to Compel* had been resolved.¹⁵ The *Second Motion to Compel* also requested that Frontier be compelled to respond to other discovery requests that had not been resolved.¹⁶ On August 20, 2003 a notice of status conference was issued setting a hearing for August 29, 2003 for the purpose of considering the *Second Motion to Compel* and the parties' joint motion requesting that the hearing date be changed. On August 29, 2003 Counsel for Frontier filed a letter advising that the parties were meeting that morning to attempt to resolve remaining discovery disputes prior to the status conference. Also on August 29, 2003 counsel for each party notified the acting Hearing Officer¹⁷ that the parties were still working to resolve the disputes and asked that the status conference scheduled for that day be rescheduled. On September 19, 2003 the Hearing Officer issued an order adjusting the procedural schedule in this docket such that the hearing of this matter previously set for September 22, 2003 was continued until further

¹³ *Joint Motion to Adjust Schedule*, p. 1 (July 21, 2003)

¹⁴ *Joint Motion to Adjust Schedule*, p. 2 (July 21, 2003)

¹⁵ *Second Motion to Compel*, p. 1 (August 4, 2003)

¹⁶ *Second Motion to Compel*, p. 1 (August 4, 2003)

¹⁷ General Counsel Richard Collier acted on behalf of the Hearing Officer in place of Randal Gilliam during the telephone conference call with the parties

notice and directing the parties to file documentation, either jointly or separately, regarding the status of outstanding discovery disputes¹⁸ On September 29, 2003 the Hearing Officer issued an order extending the time for the parties to advise the Hearing Officer of outstanding discovery disputes to October 13, 2003. No documentation was filed regarding the status of outstanding discovery disputes and thereafter the Hearing Officer issued a notice of status conference on November 25, 2003 setting a status conference for December 9, 2003 to address outstanding procedural and discovery issues

During the December 9, 2003 status conference, counsel for Ben Lomand identified the outstanding discovery issues as Interrogatories 9, 10, 11 and 16 from *Ben Lomand's First Discovery Request*¹⁹ Counsel for Ben Lomand also identified an issue with regard to Frontier's *Additional Supplemental Response* to Ben Lomand's outstanding discovery requests; specifically, counsel for Ben Lomand stated that in the *Additional Supplemental Response* Frontier had failed to state the amount of revenue received from business customers and had failed to state the amounts associated with uncollectible business customer accounts²⁰ At the conclusion of the December 9, 2003 status conference the Hearing Officer requested that counsel for Ben Lomand file a pleading specifically identifying the discovery items for which there remained a dispute between the parties and that Counsel for Frontier file a response²¹ The Hearing Officer also asked the parties to submit a proposed procedural schedule including proposed dates for the hearing of this matter.²²

¹⁸ *Order Granting Joint Motion to Reset Hearing Date and Set Pre-Hearing Status Conference*, p 2 (September 19, 2003)

¹⁹ Transcript of Proceedings, p 5 (December 9, 2003)

²⁰ Transcript of Proceedings, p 5 (December 9, 2003)

²¹ Transcript of Proceedings, p 10 (December 9, 2003)

²² Transcript of Proceedings, p 15 (December 9, 2003)

Pursuant to the Hearing Officer's request, Ben Lomand filed its *Third Motion to Compel* on December 12, 2003 identifying the remaining discovery requests as Interrogatories 9, 10, 11, and 16 from *Ben Lomand's First Discovery Request* as well as Ben Lomand's requests from *Ben Lomand's Second Discovery Request* for information regarding Frontier's revenue from business customers and Ben Lomand's request for information regarding revenue received from business customers and information regarding amounts associated with uncollectible business customer accounts²³ Frontier filed its *Response to Third Motion to Compel* on December 17, 2003 objecting to each of the remaining discovery requests.²⁴ *Ben Lomand Inc 's Reply to Citizen's Response* on December 31, 2003.

II. REMAINING DISCOVERY REQUESTS

A. Unresolved Items from *Ben Lomand's First Discovery Request*

The interrogatories identified in the *Third Motion to Compel* and stated in *Ben Lomand's First Discovery Request* read as follows

Interrogatory 9. In what exchanges in other states has Frontier and its affiliates offered tariffs similar to the April 11, 2002 Tariff in which the rates/tariffs are lower than in other Frontier exchanges in such state?

Interrogatory 10 For those exchanges and/or states listed in the answer to Interrogatory No 9, list such rates/tariffs that have been rejected, revoked, or disapproved by the respective public utility commissions (equivalent to the Tennessee Regulatory Authority)?

Interrogatory 11. For those exchanges and/or states listed in the answer to Interrogatory No 9, list the competitors (ILECS/CLECS) which terminated business in such exchanges, were sold to other competitors or Frontier and its affiliates, or were merged with another competitor or Frontier and its affiliates?

²³ *Ben Lomand communications, Inc 's Third Motion to Compel Responses to Its Discovery Requests*, pp 3-4 (December 12, 2003)

²⁴ *Response to Ben Lomand Communications, Inc 's Motion to Compel Responses to Its Discovery Requests*, pp 3, 7 (December 17, 2003)

Interrogatory 16 List the exchanges in Tennessee in which Frontier is faced with competition from other land-line competitors²⁵

B. Unresolved Items from *Ben Lomand's Second Discovery Request*

The data requests identified in the *Third Motion to Compel* and stated in *Ben Lomand's Second Discovery Request* read as follows:

Data Request 2. For the current month, year-to-date, and 12 months-to-date values indicated in Exhibit 1, page 1 of 5, line 5 denominated "less Uncollectibles" associated with operating revenue, indicate the amount (by either absolute value or as a percentage of the total) of the uncollectibles associated with operating revenues derived from the "local Network category (line 1).

Data Request 3. For the current month, year-to-date, and 12 months-to-date values indicated in Exhibit 1, page 1, line 5 denominated "Less Uncollectibles" associated with operating revenues, indicate the amount (by either absolute value or as a percentage of the total) of uncollectibles associated with operating revenues derived from business, rather than residential, customers²⁶

C. Positions of the Parties

With its *First Motion to Compel*, Ben Lomand stated that the information requested in Interrogatories 9, 10, 11 and 16 "may show that Frontier has targeted the McMinnville and Sparta exchanges for the elimination or discouragement of competitors by setting its tariffs below cost, offering upgraded services in such exchanges, and that Frontier offered such tariffs elsewhere than in those exchanges in Tennessee with the result that such tariffs may have been rejected or let to elimination or discouragement of competition in such exchanges" and is thus "relevant and necessary to prove predatory pricing."²⁷ Also in its *First Motion to Compel*, Ben Lomand relied on this same reasoning in stating that Frontier should be compelled to answer Data Request 3

²⁵ *Ben Lomand's First Discovery Request*, pp 7-9 (February 4, 2002)

²⁶ *Ben Lomand's Second Discovery Request*, p 6 (July 2, 2003)

²⁷ *First Motion to Compel*, p 4 (February 27, 2003)

With its *Second Motion to Compel* Ben Lomand stated that with regard to Interrogatories 9, 10, 11 and 16 “it is essential to know why certain services have been offered in the McMinnville and Sparta areas and not elsewhere in Tennessee” for the same reasons as stated in its *First Motion to Compel* and that proof of adherence to the cost floor does not disprove a claim of predatory pricing.²⁸ With regard to Data Requests 2 and 3 Ben Lomand stated that the requested information “is necessary to prove predatory pricing” and that Frontier “should be able to furnish and track the amount of its uncollected business revenue.”²⁹

With its *Third Motion to Compel* Ben Lomand restated the reasons offered in its first two motions to compel and stated further that the requested information may show that the *Tariff* may have put competition out of business in other states or may have been denied by other state commissions and that such would show a pattern of anti-competitive practices or predatory pricing.³⁰ Ben Lomand also restated its earlier reasoning regarding the need for the information requested in Data Requests 2 and 3

Ben Lomand Inc 's Reply to Citizen's Response submitted that it may discover information relevant to anti-competitive practices in addition information relevant to predatory pricing.³¹

Frontier stated in its *First Response to Ben Lomand's First Discovery Request* that, pursuant to the TRA's ruling regarding Frontier's *Motion to Dismiss*, the sole issue before the Authority is whether the *Tariff's* prices are below the price floor established pursuant to § 65-5-208(c) and on this basis objected to Interrogatories 9, 10, 11 and 16.³²

²⁸ *Second Motion to Compel*, p 4 (August 4, 2003)

²⁹ *Second Motion to Compel*, p 6 (August 4, 2003)

³⁰ *Third Motion to Compel*, p 4 (December 12, 2003)

³¹ *Ben Lomand Inc 's Reply to Citizen's Response*, p 3 (December 31, 2003)

³² *First Response to Ben Lomand's First Discovery Request*, pp 5-7 (February 18, 2003)

With its *First Response to Motion to Compel* Frontier maintained the position that discovery in this docket should be limited to whether its pricing is below the price floor³³ Frontier interpreted Ben Lomand's *Motion to Compel* as arguably "seeking to apply a Sherman Act, Section Two analysis to its claim" and stated that, to the extent such an analysis takes place, further discovery should not proceed until Ben Lomand first demonstrates that Citizens has instituted below-cost pricing designed to monopolize the McMinnville or Sparta exchanges³⁴

Frontier continued its position that this docket is proceeding only on "the sole claim of whether the April 11 tariff reflected predatory pricing under T.C.A. § 65-5-208(c)" in its *Response to Ben Lomand's Second Discovery Request* and in its *Response to Third Motion to Compel*³⁵ On this basis, Frontier maintained that the information sought in Interrogatories 9, 10, 11 and 16 is completely irrelevant to the issue of predatory pricing and that Frontier should not be required to produce it.³⁶ In each of these filings, Frontier also continued its position that to the extent a Sherman Act analysis is to take place in this docket, further discovery should not proceed until Ben Lomand first demonstrates that Citizens has instituted below-cost pricing.

Regarding Data Request 2 and Data Request 3, Frontier stated in both its *Response to Ben Lomand's Second Discovery Request* and in its *Response to Third Motion to Compel* that it does not track the information requested in the ordinary course of its business and should not have to produce records it does not keep³⁷

³³ *First Response to Motion to Compel*, pp 3-4 (April 7, 2003)

³⁴ *First Response to Motion to Compel*, pp 4-7 (April 7, 2003)

³⁵ *Response to Ben Lomand's Second Discovery Request*, p 2 (July 18, 2003) See also *Response to Third Motion to Compel*, p 3 (December 17, 2003) The *Response to Ben Lomand's Second Discovery Request* and the *Response to Third Motion to Compel* are essentially the same document in terms of content The *Response to Third Motion to Compel* was submitted pursuant to the Hearing Officer's request

³⁶ *Response to Ben Lomand's Second Discovery Request*, pp 3-4 (July 18, 2003)

³⁷ *Response to Ben Lomand's Second Discovery Request*, p 7 (July 18, 2003) See also *Response to Third Motion to Compel*, p 7 (December 17, 2003)

D. Applicable Law

Authority Rule 1220-1-2- 11(1) provides that

Parties are encouraged where practicable to attempt to achieve any necessary discovery informally, in order to avoid undue expense and delay in the resolution of the matter at hand. When such attempts have failed or where the complexity of the case is such that informal discovery is not practicable, discovery shall be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure.

The Tennessee Rules of Civil Procedure permit various mechanisms for discovery including written interrogatories and requests for production of documents or things.³⁸ Through these mechanisms a party may discover information regarding “any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.”³⁹ When a person served with discovery declines to comply with a discovery request, or provides an incomplete response to a discovery request, the requesting party may file a motion to compel.⁴⁰

The information sought must, at a minimum, be reasonably calculated to lead to admissible evidence.⁴¹ The Tennessee Court of Appeals has commented on relevancy stating that

Relevancy is extremely important at the discovery stage. However, it is more loosely construed during discovery than it is at trial. The phrase “relevant to the subject matter involved in the pending action” has been construed “broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.”⁴²

A court may limit discovery in certain circumstances including where the court finds that “the discovery is unduly burdensome or expensive, taking into account the needs of the case, the

³⁸ Tenn. R. Civ. P. 26.01

³⁹ Tenn. R. Civ. P. 26.02(1)

⁴⁰ Tenn. R. Civ. P. 37.01

⁴¹ Tenn. R. Civ. P. 26.02(1)

⁴² *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 220 (Tenn. Ct. App. 2002) (citations omitted) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1978)).

amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation "⁴³ When a request to limit discovery is made the competing interests and hardships involved should be balanced and consideration should be given as to whether a less burdensome means for acquiring the requested information is available."⁴⁴

Rule 34.01 of the Tennessee Rules of Civil Procedure states the proper scope for requests for production as follows:

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requesting party's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26.02 and which are in the possession, custody or control of the party upon whom the request is served, or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26.02.⁴⁵

III. FINDINGS AND CONCLUSIONS

The Hearing Officer finds that the information requested in Interrogatories 9, 10, 11 and 16 as identified in the *Third Motion to Compel* and as stated in *Ben Lomand's First Discovery Request* is relevant for purposes of discovery. Contrary to Frontier's assertions in its *First Response to Ben Lomand's First Discovery Request*, the TRA's *Order* resolving Frontier's *Motion to Dismiss* left open more than just the issue of predatory pricing or whether the prices for the services offered in the *Tariff* were set above the cost floor. The *Order* also provided that a contested case would proceed regarding the allegations of anti-competitive behavior in violation

⁴³ *Marceaux v Sundquist*, 107 S.W.3d 527 (Tenn. Ct. App. 2002) (quoting Tenn. R. Civ. P. 26.02(1)).

⁴⁴ *Duncan v Duncan*, 789 S.W.2d 557, 560-61 (Tenn. Ct. App. 1990).

⁴⁵ Tenn. R. Civ. P. 34.01.

of Tenn. Code Ann. § 65-5-208(c).⁴⁶ The information sought in Interrogatories 9, 10, 11 and 16 may reasonably lead to the discovery of material relevant to Ben Lomand's claim of anti-competitive practices. This information may also reasonably lead to the discovery of material relevant to predatory pricing—an issue that Frontier has acknowledged remains open in this docket.

Interrogatory 9 seeks information regarding similar tariffs in other states. The information requested in Interrogatory 9 is relevant to the subject matter of predatory pricing as it may be used to discern the business practices used by Frontier in response to competition and could be used to discover Frontier's response to other companies entering markets in which it participates. Aggressive pricing may simply indicate the presence of vigorous competition in a given market. However, aggressive pricing may also serve to identify anti-competitive conduct or, in extreme cases, predatory pricing. Therefore, information regarding pricing in markets in other states is potentially useful for discerning a pattern of predatory pricing when such pricing is compared with the pricing in the markets at issue in this docket.

Interrogatory 10 seeks information regarding the actions of other state regulatory commissions with respect to similar tariff filings. The TRA, while not bound to follow as precedent the decisions of other commissions, has traditionally considered the decisions of other state agencies in the course of its deliberations on various matters before it. Further, this information may reasonably lead to the discovery of material relevant to predatory pricing or anti-competitive practices.

Interrogatory 11 seeks information regarding the businesses identified in Interrogatory 9 that now no longer operate independently. Predatory pricing or other anti-competitive behavior is among the possible explanations for a competitor's exit from a given market. This information is

⁴⁶ *Order*, p. 8 (April 29, 2003).

relevant to the impact similar tariffs have had in other markets and may, through comparative analysis, reasonably lead to the discovery of material relevant to predatory pricing or anti-competitive practices in the McMinnville and Sparta markets

Interrogatory 16 requests a listing of Tennessee exchanges in which Frontier faces other land-line competitors. This information may serve to demonstrate the levels of competition Citizens faces in the McMinnville and Sparta exchanges relative to the levels of competition if faces in other Tennessee markets. Therefore this type of information may lead to the discovery of material relevant to predatory pricing or anti-competitive practices. For these reasons the Hearing Officer finds that the motion to compel responses to Interrogatories 9, 10, 11 and 16 should be granted and Frontier's objections overruled.

Frontier's objection to producing the information requested in Data Request 2 and Data Request 3 is well founded to the extent that Frontier simply does not possess the requested information in any form or format whatsoever. Rule 34.01 of the Tennessee Rules of Civil Procedure requires only the production of items "which are in the possession, custody or control of the party upon whom the request is served."⁴⁷ However, to the extent that Frontier does have the requested information, but does not "track" the requested information in the manner or format requested, Frontier may reasonably be required to translate into reasonably usable form, any data compilations from which such information can be obtained, subject to the limitations set forth in Rule 26.02 regarding discovery which is unduly burdensome or expensive.⁴⁸ Frontier should not be required to create information it simply does not have. However, Ben Lomand should not be put to the task of correctly guessing the manner in which Frontier keeps track of those persons or entities that do not pay Frontier for its services and precisely identifying

⁴⁷ Tenn. R. Civ. P. 34.01

⁴⁸ Tenn. R. Civ. P. 34.01

Frontier's method when forming a request for production. Contrary to Frontier's assertions that these data requests are "overbroad", the Hearing Officer finds that the requests are succinct and clearly written to identify information associated with a specific periods of time and particular types of data, i.e., uncollectibles associated with "Local Network" revenues and uncollectibles associated with business revenues. Frontier has not affirmatively taken the position that it does not have any of the information requested, but rather that it does not "track" the information in the manner suggested by the data requests. The Hearing Officer finds that it is likely that Frontier keeps track of persons and entities that have not paid for services rendered. While requiring Frontier to create information it does not have would be unduly burdensome, requiring Frontier to provide information currently in its possession in a reasonably usable form is consistent with Rule 34.01 of the Tennessee Rules of Civil Procedure. Accordingly, the Hearing Officer finds that the material requested in Data Request 2 and Data Request 3 should be produced, in a reasonably usable form, to the extent that Frontier has such material in its possession.

IT IS THEREFORE ORDERED:

1. *Ben Lomand Communications Inc 's Third Motion to Compel Responses to Its Discovery Requests* is granted as to Interrogatories 9, 10, 11 and 16.

2. Regarding Data Request 2 and Data Request 3, Frontier shall not be required to create information that it does not currently have in its possession. To the extent Frontier currently possesses the information requested by Data Request 2 and Data Request 3 in some manner or format, it shall produce such information in a reasonably usable form or, within seven (7) days from the date of this order, file a specific explanation detailing why doing so would be unduly expensive or burdensome.


Randal Gilliam, Hearing Officer